

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

MICHAEL NATHANIEL MILLER,

Charging Party,

v.

SWEETWATER UNION HIGH SCHOOL
DISTRICT,

Respondent.

Case No. LA-CE-4238-E

PERB Decision No. 1439

May 22, 2001

Appearances: Michael Nathaniel Miller, on his own behalf; Atkinson, Andelson, Loya, Ruud and Romo by Clifford D. Weiler, Attorney, for Sweetwater Union High School District.

Before Amador, Baker and Whitehead, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (Board) on appeal by Michael Nathaniel Miller (Miller) to a Board agent's dismissal (attached) of the unfair practice charge. The charge alleges that the Sweetwater Union High School District violated section 3543.5(a) of the Educational Employment Relations Act (EERA)¹ by

¹ EERA is codified at Government Code section 3540 et seq. Section 3543.5(a) provides, in relevant part:

It shall be unlawful for a public school employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For

placing Miller on administrative leave after he requested union representation at a disciplinary hearing.

After reviewing the entire record, the Board finds the dismissal to be free of prejudicial error and adopts it as the decision of the Board itself.²

ORDER

The unfair practice charge in Case No. LA-CE-4238-E is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

² The Board notes that in his appeal, Miller asserts that he did not receive the warning letter in a timely fashion. Assuming this assertion to be true, the Board reviewed the appeal to ascertain whether Miller has stated a prima facie case of a violation of EERA. Having found none, dismissal is appropriate for the grounds stated by the Board agent in the attached dismissal.

Dismissal Letter

February 27, 2001

Michael Miller
540 65th, Apt. 201
San Diego, CA 92114

Re: Michael Nathaniel Miller v. Sweetwater Union High
School District
Unfair Practice Charge No. LA-CE-4238
Dismissal and Refusal to Issue a Complaint

Dear Mr. Miller:

In the above-referenced charge, filed on November 14, 2000, Michael Nathaniel Miller alleges the Sweetwater Union High School District (District) violated the Educational Employment Relations Act (EERA or Act) § 3543.5 by placing him on administrative leave.

I indicated to you, in my attached letter dated February 16, 2001, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to February 26, 2001, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my February 16, 2001 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code

Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall

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be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, sec. 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By
Tammy L. Samsel
Regional Attorney

Attachment

cc: Clifford D. Weiler

Warning Letter

February 16, 2001

Michael Miller
540 65th, Apt. 201
San Diego, CA 92114

Re: Michael Nathaniel Miller v. Sweetwater Union High School District
Unfair Practice Charge No. LA-CE-4238
WARNING LETTER

Dear Mr. Miller:

In the above-referenced charge, filed on November 14, 2000, Michael Nathaniel Miller alleges the Sweetwater Union High School District (District) violated the Educational Employment Relations Act (EERA or Act) § 3543.5 by placing him on administrative leave. My investigation of the charge revealed the following information.

Miller is employed by the District as a Custodian at Eastlake High School. As a classified employee, Miller is exclusively represented by the California School Employees Association. CSEA and the District have a collective bargaining agreement with effective dates of 1999-2001.

On August 9, 2000, Charging Party and his union representative attended a Level II Grievance meeting with Assistant Principal Ricardo del Rio, regarding Charging Party's performance evaluation. The parties were unable to reach an agreement.

At approximately 4:15 p.m., del Rio left his office for the day. At approximately 4:30 p.m., Charging Party entered del Rio's office using his master key. Charging Party is not responsible for cleaning the administrative offices and is not authorized to access such offices. Upon entering del Rio's office, Charging Party locked the door and shut the blinds.

At approximately 5:00 p.m., Assistant Principal Bob Barrett walked past del Rio's office and noticed the light was on. While next to the door, Barrett reported hearing keystrokes on a computer keyboard, and believing del Rio to be in his office, Barrett knocked on the door. After 20 seconds, Charging Party opened the door to del Rio's office. Barrett asked if del Rio was there and Charging Party said "No." Charging Party then left the office. After asking the Charging Party to exit the office, Barrett telephoned del Rio. Del Rio then telephoned Charging Party at home to set up a meeting for the next day.

On August 10, 2000, Charging Party was called into a meeting with del Rio and Barrett. Charging Party requested union representation at this meeting, and thus the meeting was cancelled. Charging Party was instructed to reschedule the meeting within 48 hours. Additionally, Charging Party was placed on administrative leave with pay pending the outcome of the investigation.

District Policy 4245.1, Discipline of Classified Employees, provides employees may be placed on administrative leave with pay during the processing of allegations or pending the outcome of the hearing process.

The above stated information fails to state a prima facie violation within the jurisdiction of PERB for the reasons stated below.

Charging Party contends the District placed him on administrative leave because he requested a union representative during a disciplinary meeting. To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.)

The alleged adverse action closely followed the Charging Party's participation in a meeting with a union representative. However, it appears the District's action in placing Charging Party on administrative leave with pay was consistent with District policy, which provides for such discipline when charges are pending. Moreover, Charging Party was informed of the charges against him and the reason for his administrative leave. As the Charging Party fails to provide any nexus factors other than timing, the charge fails to state a prima facie case and must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before February 26, 2001, I shall dismiss your charge. If you have any questions, please call me at (510) 622-1023.

Sincerely,

Tammy Samsel
Regional Attorney